

APPLICATION FOR JUDGESHIP

4th Judicial District 2006

A. PERSONAL INFORMATION

1. Full Name: John Joseph Bulger
 - a. What do you commonly go by: John J. Bulger
2. Birthdate: Nov. 18, 1960 _____ Are you a U.S. citizen? Yes _____
3. Social Security No. _____
4. Home Address: _____
_____ Phone: _____
5. Office Address: 200 W. Broadway, Missoula, MT 59802 attn: Court Administrator
Phone: 258-3836 _____
6. Length of residence in Montana: 45 years
7. List your place of residence for the past five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
<u>1992 to present</u>	<u>Missoula</u>	<u>Montana</u>
_____	_____	_____
_____	_____	_____

B. EDUCATIONAL BACKGROUND

8. List the names and location of schools attended, beginning with high school:

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
<u>Great Falls High</u>	<u>Great Falls, MT</u>	<u>1979</u>	<u>graduate</u>
<u>U of Montana</u>	<u>Missoula, MT</u>	<u>1984</u>	<u>B.A Journalism</u>
<u>U of M Law School</u>	<u>Missoula, MT</u>	<u>1988</u>	<u>J.D.</u>
<u></u>	<u></u>	<u></u>	<u></u>
<u></u>	<u></u>	<u></u>	<u></u>
<u></u>	<u></u>	<u></u>	<u></u>
<u></u>	<u></u>	<u></u>	<u></u>
<u></u>	<u></u>	<u></u>	<u></u>

9. List any scholarships, awards, honors and citations you have received (Eagle Scout, Book Awards, Boy's or Girl's State, etc.)

Boy's State, 1978; National Honor Society, 1978; U of M Honors College admission, 1979; U of M Mortar Board Society invitee, 1980; Bulwer Lytton Fiction Contest Honorable Mention, 1987; Kiwanian of the Year, Missoula Kiwanis Club, 1998; George E. Snell Fellow Award from Kiwanis Foundation of Montana, 2005;

10. Were you a member of the Law Review? If so, please state the title and citation of any article which was published and the subject area of the article.

Not a law review member.

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

11. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
<u>Montana Supreme Court</u>	<u>April 1989</u>
<u>US District Court for Montana</u>	<u>April 1989</u>
<u></u>	<u></u>
<u></u>	<u></u>
<u></u>	<u></u>

12. Indicate your present employment (list professional partners or associates, if any).

Missoula County District Court. I am currently a Senior Staff Attorney for the Hon. John S.
Henson, and also Missoula County District Court Administrator.

13. State the name, dates and addresses of all law firms with which you have been associated in practice, and of all governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
<u>Montana Supreme Court</u>	<u>Clerk for John C. Sheehy</u>	<u>8/89-12/90</u>
<u>Montana Supreme Court</u>	<u>Clerk fo Terry N. Triewailer</u>	<u>1/91-7/92</u>
<u>4th Judicial District Court</u>	<u>Clerk for John S. Henson</u>	<u>8/92-Present</u>
<u>4th Judicial District Court</u>	<u>Court Administrator</u>	<u>12/98-Present</u>
<u></u>	<u></u>	<u></u>
<u></u>	<u></u>	<u></u>

14. If you have not been employed continuously since the completion of your formal education, describe what you were doing.

July to November of 1988, I was employed as a field representative in the gubernatorial
campaign of Tom Judge. From November '88 to August '89, I did legal research for various
lawyers in the Great Falls area, but mostly saw to my mother who was suffering from cancer.

15. Describe the nature of your present law practice, listing the major types of law you practice and the percentage each constitutes of your total practice.

I handle all written orders and opinions which issue from Department 2, and have done
so for more than 13 years. As such, I have dealt with every type of law which is commonly
seen at the district court level. Due to the breadth of that work, it would be difficult to
quantify in percentages the type of work which I do.

16. List other areas of law in which you have practiced, including teaching, lobbying, etc.

N/A

17. If you specialize in any field of law, what is your specialty?

N/A

18. Do you regularly appear in court? I appear in courts of limited jurisdiction on occasion

What percentage of your appearance in the past five years were in:

Federal Court	<u> </u>	%
State or local courts of record	<u> 100 </u>	%
Administrative bodies	<u> </u>	%
Other	<u> </u>	%

19. During the past five years, what percentage of your practice has been trial practice? N/A %

20. How frequently have you appeared in court? Less than 1 time per month on average.

21. How frequently have you appeared at administrative hearings?
N/A times per month on average.

22. What percentage of your practice involving litigation has been:

Civil	<u>90</u>	%
Criminal	<u>10</u>	%
Other	<u></u>	%

23. Have you appeared before the Montana Supreme Court within the past five years? If so, please state the number and types of matters handled. Include the case caption, case citation (if any), and names addresses and phone numbers of all opposing counsel for the five most recent cases.

No

24. State the number of jury trials you have tried to conclusion in the past ten years. 0

25. State the number of non-jury trials you have tried in the past ten years. 75+

26. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Please include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, give the same information regarding opposing counsel and the nature of the matter.

All my trial work has been *pro bono* for the Crime Victim Advocate program in Missoula.

My work was to secure orders of protection, primarily for women who had been subjected

to partner assault. In many instances, there was no opposing counsel. Given the nature of these proceedings, I did not deem it necessary to retain information such as opposing counsel, as my representation terminated at the conclusion of the hearings.

27. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

I have chaired the Medical-Legal Panel approximately three times in the last five years.

28. If you have published any legal books or articles, other than Law Review articles, please list them, giving citations, dates, and the topics involved. If you lectured on legal issues at Continuing Legal Education seminars or otherwise, please state the date, topic and group to which you spoke.

Electronic Courtroom Practice CLE - Missoula District Court, 3/21/03

Electronic Courtroom Practice CLE - Ravalli County District Court 11/8/2004

D. PROFESSIONAL AND PUBLIC SERVICE

29. List all the bar associations and legal professional societies of which you are a member and give the titles and dates of any office you have held in such groups, and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

District Court Council Technology Committee - 2001-2002

30. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the past five years. Please state the title and date of any office you have held in each such organization. If you held any offices, please describe briefly your activities in the organization.

Kiwanis Club of Missoula :

Vice President 10/1/02 - 9/30/03 - responsible for weekly programs

President Elect 10/1/03 - 9/30/04 - responsible for organization of fund-raising

breakfast which grossed approximately \$18,000

President 10/1/04 - 9/1/05 -head the club and oversee \$30,000 budget used

in club's mission to help local youth

31. Have you ever run for, or held, public office? If so please give the details.

I was an unsuccessful candidate for Missoula County Justice of the Peace in 1994

E.HEALTH RECORD

32. Do you have any disabilities or impairments that might interfere with your performance of the duties of a judge? If so, please explain.

None

F. PROFESSIONAL CONDUCT AND ETHICS

33. Have you ever been disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, give the particulars.

No

34. Do you know if any proceeding is pending against you before any court, the Commission on Practice of the State of Montana, Judicial Standards Commission, or by any administrative agency or disciplinary committee? If so, give the particulars.

No

35. Have you ever been found guilty of contempt of court, or sanctioned by any court for any reason? If so, please explain.

No

36. Do you disagree with any of the Canons of Judicial Ethics applicable to Montana Judges? If so, please explain.

No

37. Have you ever been arrested or convicted of a violation of any federal law, state law, county or municipal law, regulation or ordinance? If so, please give details. Do not include traffic violations for which a fine of \$100 or less was imposed unless it also included a jail sentence.

No

38. Have you or your professional liability insurance carrier ever settled a claim against you for professional malpractice? If so, please give the particulars, including the amounts involved.

No

39. Have you ever been found guilty in any civil or criminal proceedings with conduct alleged to have involve moral turpitude, dishonesty and/or unethical conduct? If so, please give details.

No

40. Is there any circumstance or event in your personal or professional life which, if brought to the attention of the Commission, the Governor or the Montana Supreme Court, that would affect adversely your qualifications to serve on the court for which you have applied? If so, please explain.

None

G. BUSINESS AND FINANCIAL INFORMATION

41. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, please give details, including dates.

No

42. If you are an officer, director, or otherwise engaged in the management of any business, please state the name of such business, its nature, and the nature of your duties. State whether you intend to resign such position immediately upon your appointment to a judicial office.

N/A

43. State whether during the past five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization, If so, please identify the source and the approximate percentage of your total income it constituted over the past five years.

None

44. Do you have any financial interests, investments or retainers which might conflict with the performance of your judicial duties, or which in any manner or for any reason might embarrass you? If so, please explain.

None

45. Have you filed appropriate tax returns as required by federal, state, local and other government authorities? X Yes No

If not, please explain.

46. Do you have any liens or claims outstanding against you by the internal Revenue Service?
 Yes X No

If yes, please explain.

47. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five (5) years? If so, please give details.

No.

48. Please explain your philosophy of public involvement and practice of giving your time to community service.

Herman Melville said that “our lives are connected by a thousand invisible threads, and
along these sympathetic fibers, our actions run as causes and return to as results.” I believe
by helping others we enrich ourselves, and our true worth is not measured in our personal success
but in our value to others. I am refreshed by my community service and consider it an important
part of my life and identity.

H. WRITING SKILLS

49. In the last five years, explain the extent you have researched legal issues and drafted briefs. Please state if associates or others have generally performed your research and the writing of briefs.

I have personally read every substantive motion and brief presented the Court for the last
five years (and the eight preceding), and have authored the entirety of written output by Dept.
No. 2 in that time. I have done this essentially without direction and with virtually no
editing of the final product.

50. If you have engaged in any other types of “legal writing” in the last five years, such as drafting documents, etc., please explain the type and extent of writing you have done.

See above. In addition, I have had cause to file briefs in several *pro bono* matters. My
writing sample is an example of my *pro bono* work.

51. Please attach a writing sample of no more than ten pages which you have written yourself. A portion of a brief or memorandum is acceptable.

52. What percentage of your practice for the last five years has involved research and legal writing?
85 %

53. Are you competent in the use of Westlaw and/or Lexis?

Yes

I. MISCELLANEOUS

54. Briefly describe your hobbies and other interests and activities.

I am a sports junkie and have achieved mediocrity in such things as tennis, squash, fly fishing, rafting, golf, and volleyball. I also enjoy music and dancing. I am an avid reader, and a constant purveyor of news. I find the internet to be a fascinating tool, and am constantly amazed at the breadth of information to be found there. I take great comfort in the company of my friends and family, and see them often. I love to travel and prefer the back road to the interstate.

55. Describe the jobs you have held during your lifetime.

Newspaper delivery, age 8-10. Coca-Cola Co. stockman. Tennis assistant instructor at Meadow Lark Country Club during high school. Food service employee during entire collegiate career. Head tennis instructor at Camp Lincoln, Minnesota in summer of 1983. Bartender at The Brewery Pub in Missoula in year between college and law school.

56. Please identify the nature and extent of any pro bono work that you have personally performed during the past five years.

I am the longest serving *pro bono* counsel associated with Missoula's Crime Victim Advocate program, helping get permanent orders of protection for clients. I have also taken a handful of civil and criminal defenses in instances where I felt the prosecution of the matters was unjust.

57. In the space provided, please explain how and why any event or person has influenced the way you view our system of justice.

Foremost, my parents, and in particular my father. Jim Bulger was a family physician who felt a moral obligation to help those who were less fortunate. I once accompanied him to Hill 57 on the outskirts of Great Falls, a Native American shanty town, where he performed house calls on numerous occasions, and was the only physician in Great Falls who cared to venture there. I am sure he received no payment, but he came away richer nonetheless.

I had the great fortune to clerk for John "Skeff" Sheehy in his last 17 months on the bench. Skeff made it clear that part of the obligation of an attorney is to see that the little guy be afforded a fair shake from a system which, unfortunately, sometimes loses sight of the credo of equal justice for all.

The financial hamstringing of Legal Services programs by Congress in 1994 reaffirmed Justice Sheehy's wisdom that the interests of the less affluent are not always well served by government and the more affluent. It was this that spurred me into my work with the Crime Victim Advocate program.

In that same vein, my work with District Court for the last 13 years has convinced me that the legal system must do more to ensure that the indigent and less fortunate are better served. I strongly advocate *pro bono* service for attorneys, which has three beneficial effects: It gives much needed help to those in need, it bolsters the image of the legal profession, and it would greatly aid the speedy administration of justice in a system which is becoming more clogged with *pro se* litigants each year.

58. In the space provided, explain the qualities which you believe to be most important in a good judge.

I believe judges must remember first and foremost that they are public servants, and the public
and practitioners should expect and receive fair and considerate treatment. A judge should
have effective communication skills, both oral and written. He or she should possess the
analytical skills to recognize the key points in litigation and avoid getting bogged down by
minutiae. A judge must be able to guide litigants through the process in a timely fashion
with a fair but firm hand. A judge must listen – not all litigants are eloquent, but they have
a story to tell, and it is often their inability to have anyone listen that leads them to litigation.
A judge should be circumspect in his personal life. He should have a sense of humor and a
healthy dose of humility. She should maintain a healthy balance of work and play, and have
interests and passions outside of work.. He should understand that he holds great power over
the lives and well-being of those who appear before him, and never treat that power lightly.
She should recognize that technology is a powerful ally, and should be well-versed in its use
and encourage its use by practitioners. He should recognize that he cannot know all there is
to know about the law, and should not be afraid to admit that he does not always know the answer.
He should be intellectually curious, and continue to grow. She should be interested in people,
because it is people, and not property or money with which she must deal every day.
He should enjoy the work, because there are few creatures more unpleasant than a sour judge.

59. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

I believe a District Court judge must be wary of diverging from precedent. A consistency of application of law in the trial court is necessary absent a clear indication that its application will lead to an unequivocally unjust or constitutionally unsound result.

If a matter of first impression is presented, the Court should attempt to craft a reasoned decision and clearly set forth the reasoning behind it to aid in appellate review.

There are numerous instances where decisions differ from judge to judge, as I have found using research tools of district court opinions. Such divergence of opinion is to be expected, as the unique facts of each case tend to drive the result.

It is within the power of the Court to certify a particular ruling under Rule 54(b), Mont.R.Civ.P. for review by the Supreme Court, but it is a rare instance where all necessary factors are present for certification.

I can think of no more common complaint by practitioners than a judge failing to follow the law.

60. In the space provided, state the reasons why you are seeking judicial office. Please indicate whether the judicial salary will be an increase or decrease over in your current gross income.

After nearly three years of appellate clerkship and nearly 14 years at the District Court level, I continue to be fascinated by the processes of the judiciary. I have worked for three

judges, all of whom have been unique in their approach to parsing the law, and I have learned from all of them. My interest in being a judge led me to my decision in 1994 to run for Justice of the Peace, and I have stayed at my current job because it continues to be fulfilling and interesting, and I am, frankly, good at it. I enjoy the challenge of analysis, and I enjoy the process of reasoning and crafting a sound and workable decision. While continuing in these processes, I crave the increased challenge of being a judge and working with the public and litigants. I have had nearly 17 years of direct immersion in the judiciary, and feel I am uniquely qualified to step comfortably up to the next level. There is no in this district with a better understanding of Dept. 2's operation; for the last 13+ years, I have worked closely with Judge Henson, and know the challenges of the position. I have had a grounding in nearly every area of the law which a district judge might encounter. I believe I have the requisite knowledge, acumen, talent and temperament to make an excellent District Judge

This position would be an increase in my current wage.

61. What items or events in your career have distinguished you or of which you are most proud?

I was tapped, unbidden, for my position as Court Administrator by the four Judges of this District.

I have served as on-call *pro bono* counsel for 11 years with the Crime Victim Advocates.

I have been retained for nearly 14 years by Judge Henson, which I believe is a testament to my capabilities and our teamwork approach to the administration of justice.

62. State any pertinent information reflecting positively or adversely on you which you believe should be disclosed to the Judicial Nomination Commission.

I am in excellent health, physically and mentally. I have a positive outlook, strong family support and a network of close friends. I have an inquisitive nature and a love of puzzle

and problem solving which I believe are an asset to the position. I am extremely capable with technology. I personally installed the electronic courtroom systems in Missoula and Hamilton.

63. Is there any comment you would like to make that might differentiate you from other applicants or that are unique to you that would make you the best judicial candidate?

The stresses and difficulties of the job are not unknowns to me, as I have felt the effects personally and have seen them on Judge Henson. I know what routines and policies have been effective and which ones need reworking. In my Court Administrator position, I have had opportunity also to become familiar with the other Judges of this district and how they manage their caseloads, and would be able to draw upon their expertise in performing the duties of District Judge. Further, I am on excellent terms with these three judges, whom I consider allies, and would have no difficulty in continuing to work with them to ensure the smooth operation of the local Court system. I also have good working relations with all Court staff. In sum, I believe that you will find no other applicant to be as qualified to step in and take the reins of Dept. 2 with the ease of transition as myself.

J. CERTIFICATE OF APPLICANT

I understand the submission of this application expresses my willingness to accept appointment to the Judiciary of the State of Montana, if tendered by the Governor of the Montana Supreme Court, and further, my

willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Canons of Judicial Ethics, if appointed.

3/17/06

(Date)

(Signature of Applicant)

Application form approved 7/10/93
Revised 12/27/94

1 John J. Bulger
2 411 Village Place
3 Missoula, MT 59802
4 (406) 523-2836
5 Attorney for Defendant
6
7
8

9 **◀MUNICIPAL COURT, BILLINGS, MONTANA▶**

10 CITY OF BILLINGS,

11 Plaintiff,

12 -vs-

13 TAL BENJAMIN CONNOR,

14 Defendant.
15

CAUSE NO. 2003-CR-1000275

**MOTION TO SUPPRESS
AND BRIEF IN SUPPORT**

16 **MOTION TO SUPPRESS**

17 Defendant Tal Benjamin Connor hereby moves the Court to suppress
18 the evidence obtained by law enforcement on the grounds that the search
19 instigated by law enforcement was contrary to Montana law, and that the
20 resulting investigatory stop and custodial interrogation of Defendant was
21 unlawful.
22

23 DATED this 23rd day of April, 2003.

24 _____
25 John J. Bulger, Counsel for
26 Tal Connor
27

BRIEF IN SUPPORT
STATEMENT OF FACTS

On February 5, 2003, Tal Connor was a passenger on a Greyhound bus en route from Missoula, Montana to Boulder, Colorado to attend a lifelong friend's wedding. In the late evening, the bus pulled into the terminal in Billings for a scheduled stop. The bus was essentially full when it made the Billings stop. Tal Connor temporarily debarked from the bus during the stop at the request of the bus line for "cleaning and service." Unbeknownst to him in his absence, a Billings law enforcement officer boarded the bus with a drug-sniffing dog. Tal Connor never encountered the dog or the officer when the search of the bus was being made, and no search of his possessions or person was made by the dog.

Officer Feuerstein made the following statement in his Affidavit in Support of Complaint:

The Court is informed that: the def was a passenger on the Greyhound Bus. Upon arrival of the bus into the Billings Terminal Officer S Feuerstein and PSD "IGOR" conducted bus interdiction. During the interdiction PSD "IGOR" gave a positive indication for the odor of narcotics on the floor just behind the drivers [sic] seat. The driver pointed out the def and advised that the def was seated where "IGOR" had indicated. Contact was made with the def and he consented to search of his bag, which was on the floor of the bus for the trip. The def then advised he had moved the marijuana to his person and handed over a baggie of 7.1 grams of Marijuana and a glass marijuana pipe. The Marijuana was tested and found to test positive for THC.

As noted by the officer, contact was made with Tal Connor in the terminal after the search was conducted. Mr. Connor has no recollection of the officer ever identifying himself as a peace officer. The officer asked Mr. Connor if he had been sitting behind the driver. Mr. Connor responded that

1 he had stored his pack behind the driver, but indicated that he had been
2 sitting across the aisle and approximately three seats back. At the point, the
3 officer asked Mr. Connor if he would retrieve his luggage (which was stored in
4 a locker during the layover), and accompany him to a private room in the
5 terminal. As indicated in his affidavit, Mr. Connor did not feel he would have
6 been free to walk away at this point. Upon arriving in the room, the officer
7 indicated that Igor had responded to the odor of narcotics at the location
8 directly behind the driver's seat. The Court should note that Officer
9 Feuerstein's affidavit does not disclose that he informed Mr. Connor, pursuant
10 to § 46-5-402(4) and *State v. Krause*, 2002 MT 63, 309 M 174, 44 P3d 493,
11 that he was a peace officer, that the stop was not an arrest but rather a
12 temporary detention for investigative purposes, and that, unless arrested, he
13 would be released upon completion of the investigation.

14 The officer asked Mr. Connor if he could have permission to search his
15 bag. Mr. Connor acquiesced to the request, as he did not feel free to refuse
16 in the custodial atmosphere, and because he felt it necessary to proceed with
17 haste so that he might reboard the bus and continue his trip.

18 The officer searched the bag by hand and found no drugs or
19 paraphernalia. The officer then asked, "Is there anything you want to give
20 me?" Mr. Connor, believing he was being lawfully detained and searched,
21 chose to surrender a small baggie of marijuana and a pipe, which were on his
22 person. Mr. Connor was taken into custody and transported to the
23 Yellowstone County Detention Center, where he was cited for misdemeanor
24 possession of drugs and paraphernalia. He was thereafter released. As his
25 bus had departed without him, Mr. Connor was forced to resort to hitchhiking
26 to Colorado to make his friend's wedding the next day.

ARGUMENT

The practice of bringing drug sniffing dogs in areas open to the public, including bus lines, is fairly well established in the United States. The bulk of jurisdictions have acquiesced to the agreements that have been quietly forged between common carriers and law enforcement which allow for canine drug searches of luggage of passengers. The history of this quiet agreement is unknown, but the individual legal challenges to its operation, while plentiful, are doubtlessly dwarfed by the tremendous numbers of uncontested convictions that are effected under it. Challenges to warrantless searches are commonplace, but challenges to the searches and arrests made of interstate bus passengers are much less common than they might be. Why? Because the persons charged in these incidents are travelers, often of limited means, passing through and almost universally living an inconvenient distance from the court in which they are cited to appear. Cited for misdemeanor possession for marijuana in Peoria, a Walla Walla man is pretty much a sure bet to pay his fine rather than incur the greater expense of sticking around or making return travel arrangements to contest the merits of his arrest. The expediency of paying a \$500 fine outweighs the costs of a legal challenge to ensure that law enforcement is not overstepping its bounds.

Strong arguments could be made this arrangement between bus lines and law enforcement parallels the use of speed traps of lore in small town America, where the offender's circumstances dictate his unwilling sweetening of the local coffers. Had it not been for a recent decision of the Montana Supreme Court, Mr. Connor would not attack the search itself, but would address only the unlawful detention and interrogation which occurred here after the search.

1 Citizens are protected from unreasonable searches and seizures, and
2 the protections of the Fourth Amendment apply to investigatory stops. *United*
3 *States v. Cortez*, 449 U.S. 411, 417 (1981); *Terry v. Ohio*, 392 U.S. 1, 9
4 (1968). An investigatory stop can be justified if the officer has a particularized
5 suspicion to believe that criminal activity is occurring or has occurred. *United*
6 *State v. Sokolow*, 490 U.S. 1, 7 (1989); *Anderson v. State Dept. of Justice*
7 (1989), 175 Mont. 259, 912 P.2d 212. Montana law provides:

8 **46-5-401. Investigative stop.** In order to obtain or verify an
9 account of the person's presence or conduct or to determine
10 whether to arrest the person, a peace officer may stop any person
11 or vehicle that is observed in circumstances that create a
12 particularized suspicion that the person or occupant of the vehicle
has committed, is committing, or is about to commit an offense.

13 It is notable that a particularized suspicion is required for an
14 investigatory stop. It is also notable that a search was conducted in this
15 instance, and that no particularized suspicion initiated that search. While that
16 would not have been significant in the past, the Montana Supreme Court has
17 seen fit to change the law as it applies to searches involving drug sniffing
18 canines.

19 1. The *Tackitt* decision.

20 The Montana Supreme Court's most recent pronouncement regarding
21 drug sniffing canines is *State v. Tackitt* 2003 MT 81 (decided April 15, 2003).
22 In that case, the Court determined:

23 Accordingly, we hold that, given the greater protection afforded
24 individual privacy under Montana's Constitution, the balance
25 between governmental interests and individual interests in this
26 case can best be struck by requiring particularized suspicion as a
prerequisite for the use of a drug-detecting canine.

27 Our holding here is, moreover, in line with one of our
previous cases in which we determined that, under limited

1 circumstances, the particularized suspicion standard properly
2 balances individual privacy and government law enforcement
3 interests. *Hulse v. Department of Justice*, 1998 MT 108, ¶ 38,
4 289 Mont. 1, ¶ 38, 961 P.2d 75, ¶ 38 (particularized suspicion
5 required for the use of field sobriety tests). However, we also
6 make clear that the holding in this case is limited to the use of
7 drug-detecting canines during police investigations. Accordingly,
8 our conclusion here does not disturb the holdings of any past
9 cases regarding the human detection of the odor of drugs. See
10 *generally State v. Schoendaller* (1978), 176 Mont. 376, 382, 578
11 P.2d 730, 734 (odor of drugs emanating from car window not
12 sufficient for probable cause to search a vehicle); *but cf. State v.*
13 *Means* (1978), 177 Mont. 193, 199, 581 P.2d 406, 409 (odor of
14 drugs emanating from house can be considered as one factor
15 contributing to probable cause).

16 Accordingly, we hold that when a person maintains control of a
17 container in which he has a reasonable expectation of privacy, but
18 where the odors from that container are freely exposed to the
19 public, particularized suspicion is required for the use of a canine
20 to detect those odors.

21 *Tackitt* at ¶ 29. (Emphasis added.)

22 It is important to note the breadth of this ruling. Had the bus driver or
23 some other person smelled the odor of narcotics on the bus and then alerted
24 law enforcement, this might have been sufficient to create particularized
25 suspicion for a search using a drug- detecting dog. Similarly, a tip of some
26 kind would likely have been sufficient. However, no such detection from a
27 human occurred here, nor was there any other indication that any narcotics
were being transported on the bus. Without any objective evidence that
narcotics were on the bus, the search lacked particularized suspicion and
was impermissible.

This theory is further bolstered by the *Tackitt* Court distinguishing
between luggage that is checked and luggage which a passenger retains:

1 Our holding in *Scheetz* was premised on the fact that “luggage
2 that a person brings to the airport is generally subject to
3 observation by the public or the state . . . [and that] a person
4 cannot expect to conceal completely from the public the odor of
5 the luggage . . . since it must be handled by others.” *Scheetz*, 286
6 Mont. at 49, 950 P.2d at 727. We further noted that by checking
7 his luggage, the defendant lost a significant expectation of privacy
8 because he did not maintain possession and control of the
9 luggage. *Scheetz*, 286 Mont. at 50, 950 P.2d at 727. Therefore,
10 the conclusion that no search occurred relied on our holding that
11 *Scheetz* had no reasonable expectation of privacy under the facts
12 specific to the situation.

13 *Tackitt* at ¶19.

14 It is uncontested that Tal Connor did not check his luggage to be put in
15 the luggage compartment, but brought it on the bus with him, and removed it
16 from the bus when he disembarked in Billings. Only Mr. Connor handled his
17 luggage. He clearly had reasonable privacy expectations as to its contents.

18 Given this recent pronouncement in *Tackitt*, the search here was illegal
19 and all evidence seized as a result must be suppressed.

20 2. Linking of area of odor of narcotics with Defendant.

21 As pointed out above, absolutely no particularized suspicion of
22 Defendant transporting narcotics was ever adduced prior to the search of the
23 bus. Even had there been some indication that narcotics were on the bus, no
24 sufficient evidence existed to pinpoint Tal Connor as the source of those
25 narcotics for an investigatory stop to occur.

26 As Officer Feuerstein noted in his affidavit, Igor gave a positive
27 indication to the odor of narcotics on the floor of the bus directly behind the
driver. At this time, no passengers were on the bus, as all had been asked to
disembark to allow “cleaning and service.” The dog did not key upon any
piece of luggage, but simply indicated an area where an odor lingered. We

1 do not know where or how much luggage had been stored on the bus, but we
2 do know that the bus was nearly filled to capacity. Is it possible that Igor
3 might have keyed upon narcotics that were being transported by another
4 passenger on that bus? Clearly, the answer is yes. Is it also possible that
5 Igor scented on narcotics that might have been present on the bus prior to the
6 Defendant ever boarding it in Missoula, or of those possessed by a
7 passenger that disembarked in Butte, Bozeman, Livingston or elsewhere
8 along the route? It is certainly plausible.

9 As the officer had no firm indication as to where the odor of narcotics
10 might have originated, he decided to enlist the driver of the bus to determine
11 which passenger might have been seated in that area. The officer's affidavit
12 states that "[t]he driver pointed out the def and advised that the def was
13 seated where "IGOR" had indicated." Such identification has inherent
14 problems on its own relating to particularized suspicion, which must be based
15 upon an officer's objective observations. This is exponentially compounded
16 here in that the driver's information was incorrect. Tal Connor had not been
17 seated in the immediate area where the dog had indicated. He had been
18 seated on the other side of the isle, some three seats back. Officer
19 Feuerstein's affidavit does not indicate that he asked the driver whose
20 luggage had been located in the subject area, and that is a critical distinction
21 here. We simply do not know what the driver might have indicated had he
22 been asked that question.

23 Based solely on this "identification," the Court has sound reason to
24 determine that the officer's suspicions that Mr. Connor was in possession of
25 narcotics were not based upon reasonable objective evidence, and that no
26 particularized suspicion existed for the questioning and detention of the
27 Defendant.

1 3. The detention of the Defendant.

2 If a person has no free right to leave, either from the express or implied
3 conduct of police officers, then the interrogation is custodial in nature. *State*
4 *v. Rushton*, (1994), 264 Mont. 248, 870 P.2d 1355. Clearly, the “temporary
5 detention” for investigation set forth in § 46-5-402(4) does not contemplate
6 the removal of a suspect to a private room in an otherwise public facility.

7 Here, the officer introduced himself, told Mr. Connor of the dog’s
8 actions, then requested Mr. Connor retrieve his luggage and accompany him
9 to a private room. The determination of whether a custodial interrogation has
10 occurred is made on a case-by-case basis and looks to whether a reasonable
11 person would feel free to leave after considering such factors as the time and
12 place of the questioning, the length and mood of the questioning, and the
13 presence of other persons during the questioning. *Rushton* (1994), 264 Mont.
14 248, 870 P.2d 1355. Interrogation is custodial if there is a significant restriction
15 of personal liberty similar to an arrest. The standard for an arrest when there is
16 not actual physical restraint is whether a reasonable person, innocent of any
17 crime, would feel free to walk away from the circumstances. *City of Billings v.*
18 *Whalen* (1990), 242 Mont. 393, 790 P.2d 471.

19 Tal Connor was apprised that the officer was investigating a possible
20 crime, and was asked to gather his belongings and accompany a uniformed
21 police officer to a private room where further questioning took place. He
22 certainly did not feel free to walk away, given the circumstances. Once a stop
23 leaves the domain of public view, the questioning takes on the nature of
24 custodial interrogation. *State v. Allen* (1998), 292 Mont. 1, 970 P.2d 81. Tal
25 Connor believed he was being lawfully detained and that he had to cooperate
26 in all respects with the officer’s requests. Any consent he might have given to
27 a search of his belongings was coercive and thereby unlawful. Further, the

1 officer's comment, "Do you want to give me anything?" was clearly of an
2 interrogative nature, akin to saying, "Do you have any contraband on your
3 person?" or "Do you wish to confess to any wrongdoing?" If an interrogation
4 is custodial, it is hornbook law that an officer must give the subject a *Miranda*
5 warning prior to questioning him. No such warning was given.

6 As set forth in his affidavit, Tal Connor did not feel that he was free to
7 leave once he was engaged by Officer Feuerstein. This was particularly so
8 where his options were limited. Had he left the station, he would have been
9 forfeiting his seat on the bus, and Defendant did not believe he would be
10 allowed back on the bus until the officer was "done with him."

11 In sum, Tal Connor respectfully submits that as the search of the
12 luggage and the questioning of Defendant were done during detention that
13 was custodial in nature, the evidence in this case must be suppressed.

14
15 DATED this 23rd day of April, 2003.

16
17 _____
18 John J. Bulger, Counsel for
19 Tal Connor
20
21
22
23
24
25
26
27